No. 90-95

In The Supreme Court of the United States

OCTOBER TERM, 1989

THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC., *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and Appendix

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in concluding that a provision of the Federal Railroad Safety Act, 45 U.S.C. § 434, may be construed as the express intention of Congress to preempt Ohio statutes and administrative regulations that are expressly preserved by the federal Hazardous Materials Transportation Act, 49 U.S.C.App. § 1811(a).

LIST OF PARTIES

The Public Utilities Commission of Ohio, and,
Jolynn Barry Butler, Chair
J. Michael Biddison, Commissioner
Ashley C. Brown, Commissioner
Richard M. Fanelly, Commissioner
Lenworth Smith, Commissioner,
in their respective capacities as Chair and Commissioners of the Public Utilities Commission of Ohio

CSX Transportation, Inc.
Consolidated Rail Corporation
Norfolk and Western Railway Company
Grand Trunk Western Railroad Company

AMICUS CURIAE

The State of Washington
The State of Tennessee
The State of Texas
The State of Oregon
The State of Nevada
The State of Missouri
The State of California

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit issued on April 13, 1990.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit, issued on April 13, 1990, is reported at 901 F. 2d 497 (6th Cir. 1990). The judgment and opinion in the original action giving rise to this Petition was issued by the United States District Court for the Southern District of Ohio, Eastern Division, on December 12, 1988, and is reported at 701 F. Supp. 608 (S.D. Ohio 1988).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Sixth Circuit was issued on April 13, 1990.

STATUTORY PROVISIONS AT ISSUE

The relevant portions of the Hazardous Materials Transportation Act (HMTA), 49 U.S.C.App. §§ 1801 *et seq.*, and the Federal Railroad Safety Act (FRSA), 45 U.S.C. §§ 421 *et seq.*, are reproduced in full in the proceeding Statement and Reasons For Granting the Writ.

STATEMENT

Thousands of tons of highly toxic or explosive "hazardous materials" are transported through the communities of this Nation on a daily basis. Accidents do happen. One recent railroad disaster near Miamisburg, Ohio ignited a rail car of phosphorous, spreading a cloud of toxic gas throughout the area and causing the evacuation of 40,000 state citizens. *See CSX Transp., Inc. v. Public Utilities Comm'n of Ohio*, 701 F. Supp. 608, 610 (S.D. Ohio 1988).

In 1974, Congress recognized the inherent problems of regulating these dangerous substances that are moved by several different modes of transportation, and called upon the states for help in enforcing the federal standards. The federal Hazardous

Materials Transportation Act (HMTA) requires that the transport of hazardous materials, by any mode of transportation, be regulated on an "intermodal" basis:

> It is declared to be the policy of Congress in this chapter to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.

49 U.S.C.App. § 1801.

> 'hazardous material' means a substance or material in a quantity and form which may pose an unreasonable risk to health and safety or property when transported in commerce;
>
> 'transports' or 'transportation' means any movement of property by any mode, and any loading, unloading, or storage incidental thereto.

49 U.S.C. § 1802(2), (6).

Further, the HMTA establishes a dual system of federal and state regulation, specifically preserving state laws that are consistent with the HMTA, and requiring that federal preemption questions be determined under the HMTA:

> (a) Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted.
>
> (b) Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this chapter or of regulations issued under this chapter and (2) does not unreasonably burden commerce. Such requirement

> shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement.

49 U.S.C.App. § 1811(a), (b).

Following the Miamisburg disaster, the State of Ohio undertook a detailed study of federal enforcement of the intermodal hazardous materials regulations under the HMTA and found federal enforcement to be inadequate. *CSX*, 701 F. Supp. at 610. Pursuant to the express requirements of the federal HMTA, on September 26, 1988, the Ohio General Assembly enacted the Ohio Hazardous Materials Transportation Act, providing that:

> The public utilities commission may adopt safety rules governing the transportation and offering for transportation of hazardous materials by railroad. *The rules adopted under this section shall be consistent with, and equivalent in scope, coverage, and content to, the provisions of the 'Hazardous Materials Transportation Act,'* 88 Stat. 2156 (1975), 49 U.S.C.A. 1801, as amended, and regulations adopted under it. No person shall violate a rule adopted under this section or any order of the commission issued to secure compliance with any such rule.

Ohio Rev. Code Ann. § 4907.64 (emphasis added).

On December 10, 1988, the Public Utilities Commission of Ohio adopted the federal hazardous materials administrative regulations, promulgated under the federal HMTA, in order to provide for state enforcement of the intermodal federal rules:

> For the purpose of enforcing federal rules for railroads and shippers by railroad, the commission hereby adopts those portions of the hazardous materials transportation regulations contained in Title 49, Parts 171 through 179, CFR, as are applicable to transportation or offering for transportation by railroad including future modifications or additions. These federal rules shall be applicable to all railroads operating within or through this state, their agents and employees, as well as to any person offering hazardous materials for transportation within or through this state by

> railroad. *These federal rules shall be enforced so as to impose no operating requirements upon railroads or shippers by railroad to which these person have not been made subject under federal rules.* Enforcement of these federal rules shall be subject to any exemptions granted by the U.S. department of transportation pursuant to Title 49, Part 107, CFR, and shall be consistent with interpretations issued by the research and special programs administration, U.S. department of transportation.

Ohio Admin. Code § 4901:3-1-10 (emphasis added).

On December 12, 1988, the United States District Court for the Southern District of Ohio, Eastern Division, granted summary judgment to the plaintiff railroads, finding the Ohio statutes and regulations to be preempted by the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 434. Specifically, the District Court held that the FRSA preempted Sections 4905.83 and 4907.64 of the Ohio Revised Code, and Sections 4901:2-7-01 through 4901:2-7-22 and 4901:3-1-10 of the Ohio Administrative Code, and permanently enjoined the Public Utilities Commission of Ohio from enforcing the state laws. *CSX*, 701 F. Supp. at 617. The State of Ohio appealed.

On April 13, 1990, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court, finding that the foregoing state administrative regulations and statutes were preempted by the general railroad safety requirements of the Federal Railroad Safety Act, and that preemption under such modal safety requirements did not frustrate the mandate of the federal HMTA requiring that the transportation of hazardous materials be regulated only on an intermodal basis. *CSX Transp., Inc. v. Public Utilities Comm'n of Ohio*, 901 F. 2d 497 (6th Cir. 1990). The preemption provision of the FRSA provides that:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State

> requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434.

Under the federal statutory scheme, the United States Secretary of Transportation (Secretary) is required to regulate the transportation of hazardous materials on an intermodal basis. 49 U.S.C.App. § 1804(a). Pursuant to this grant of authority, the Secretary has promulgated administrative rules applicable to all modes of transportation. *See* 49 C.F.R. §§ 171-79. The Secretary may delegate authority to *enforce* the intermodal regulations to the separate modal administrations comprising the Department of Transportation, such as the Federal Railroad Administration (FRA). 49 U.S.C.App. § 1808(c).

The modal administrations, including the FRA, are limited by statute to administering the statutory authority of the Secretary related to the general safety of the respective modes, and such enforcement authority as is delegated by the Secretary. *See, e.g.*, 49 U.S.C. § 103(c) (1982 & Supp. V 1987). For example, the FRA is limited to administering the "duties and powers related to railroad safety vested in the Secretary . . . and additional duties and powers prescribed by the Secretary." 49 U.S.C. §103(c) (1982 & Supp. V 1987). Thus, the FRA is responsible for exercising the Secretary's statutory regulatory authority related to railroad safety under the FRSA, and has promulgated general rail safety regulations applying only to railroad safety (49 C.F.R. §§ 200-268). Under the HMTA, the FRA is limited to *enforcement* of the intermodal regulations pertaining to rail transportation (49 C.F.R. §§ 171-179). Neither the Secretary, nor the FRA, has statutory authority to promulgate intermodal hazardous materials regulations under the FRSA. 45 U.S.C. § 431; 49 U.S.C. § 103(c) (1982 & Supp. V 1987). The Secretary is expressly forbidden from varying this statutory scheme of intermodal regulation and delegated modal enforcement authority. 49 U.S.C. § 103(d).

REASONS FOR GRANTING THE WRIT

I. The decision of the lower court conflicts with applicable decisions of this Court.

In order to find preemption in the case below, the lower court overruled the express requirements of a federal statute. The state statutes and regulations found to be preempted are *identical* to the federal HMTA and implementing federal regulations, providing only for state enforcement of the federal requirements.

Unlike the lower court, in enacting the HMTA, Congress recognized the impossibility of effective federal enforcement, given the incredible volume of hazardous materials transported in this country on a daily basis. Congress *invited and encouraged* state enforcement of consistent hazardous materials requirements. The HMTA preempts inconsistent state requirements, expressly preserves consistent state requirements, and provides a statutory means to resolve jurisdictional conflicts in the dual system of federal and state enforcement of intermodal hazardous materials requirements. The decision of the lower court has precluded any state enforcement, leaving to state citizens across the nation only the meager protection offered by an overburdened federal bureaucracy. *See CSX Transp., Inc. v. Public Utilities Comm'n of Ohio*, 701 F. Supp. 608, 610 (S.D. Ohio 1988).

The purpose of federal preemption, as consistently held by this Court, is to avoid frustrating the purpose of Congress with a multiplicity of inconsistent state regulations. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986). In the case at bar, the federal and state regulations are identical, and the Ohio regulations expressly require consistent enforcement. Thus, the purpose served by the lower court's decision is not that of Congress; rather, it is the economic interest of the nation's railroads, hoping to avoid effective enforcement of the existing federal regulations.

A. In enacting the HMTA, Congress established a dual system of federal and consistent state regulation.

The HMTA expressly limits federal preemption of state hazardous materials laws to state requirements that are inconsistent

with the HMTA, or a regulation issued under the HMTA. 49 U.S.C.App. § 1811(a). Accordingly, the police power of the states to protect citizens through consistent regulation, or as in this case, enforcement of the federal regulations, is expressly preserved. 49 U.S.C.App. § 1811(a).

Congress confirmed this reservation of police power authority to the states by providing a statutory means within the HMTA to resolve jurisdictional tensions between the federal and state governments. In this regard, Congress authorized the Secretary, upon application of a state, to determine that even "inconsistent" state requirements might survive preemption, so long as such state requirements provide an equal or greater level of protection to the public and avoid placing an unreasonable burden on interstate commerce. 49 U.S.C.App. § 1811(b).

Thus, the manifest intent of Congress is clear on the face of the HMTA: avoid inconsistent state regulation, but foster the help of the states to consistently enforce the federal requirements in order to better protect the public. The decision of the lower court has frustrated this congressional purpose, and has violated the precedential decisions of this Court.

B. This Court has consistently held that preemption is precluded where a state acts within its sphere of authority under a dual system of federal and state regulation established by Congress.

As noted by this Court, the "critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986). The lower court avoided answering this question by ignoring the intention of Congress expressed in the HMTA, and by attempting to distinguish the applicable decisions of this Court. The precedents established by this Court dictate a different result.

In *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986), this Court addressed the issue of federal preemption in the telecommunications industry. In order to determine the issue, the Court compared the general authority vested in the federal government to regulate interstate telecommunications, with a specific reservation of state *intrastate* regulatory authority. *Id.* at

369-70.[1] The Court held that the broad authority over interstate telecommunications conveyed to the federal government in the "declaration of purpose" provision of the Communications Act could not be construed to supersede an express reservation of state authority. *Id.* at 370. Further, the Court found in *Louisiana* that jurisdictional tensions arising under the dual system of federal and state regulation should be resolved by reference to the statute itself, which both established the dual system of regulation, and provided a statutory process to resolve areas of conflicting regulatory jurisdiction. *Id.* at 375.

Despite the protestations of the telephone companies, hoping to avoid state regulation by asserting that the "federal purpose" of the statute to ensure national uniformity was frustrated by state regulation, the Court refused in *Louisiana* to impose federal preemption over the clear intent of Congress to preserve a measure of state regulatory authority. *Id.* at 370. The Court noted that a tangential relationship between federal and state regulation did not amount to an express intent to preempt. *Id.* at 375-76. With regard to the protestants, the Court had a short answer: "As we so often admonish, only Congress can rewrite this statute." *Id.* at 376.

In the case at bar, as in *Louisiana*, Congress has clearly expressed an intention to preserve the authority of the states to regulate. The only stricture placed by Congress upon the states' authority is that such regulation must be consistent with federal regulation. 49 U.S.C.App. § 1811(a). As was the case in *Louisiana*, in enacting the HMTA, Congress tempered its preemption by preserving a measure of state authority, and by including a statutory means to resolve jurisdictional tensions that might arise. 49 U.S.C.App. § 1811(a), (b).

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1 The Court noted the relevant statutory provisions of the Communications Act of 1934:

> The Act establishes, among other things, a system of dual state and federal regulation over telephone service, and it is the nature of that division of authority that these cases are about. In broad terms, the Act grants to the FCC the authority to regulate "interstate and foreign commerce in wire and radio communication," 47 USC § 151 [47 USCS § 151], while expressly denying that agency "jurisdiction with respect to . . . intrastate communication service . . . ." 47 USC § 152(b) [47 USCS § 152(b)].

Louisiana, 476 U.S. at 360.

Similarly, in *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983), this Court found that the federal government had completely occupied the field of general safety regulation covering every aspect of nuclear energy generation. *Id.* at 212-13. Against the backdrop of complete federal preemption over "all matters nuclear," the Court examined the language and history of the controlling federal statute, and found an explicit congressional purpose to preserve traditional state authority to regulate the economics of energy production, including the production of nuclear energy. *Id.* at 213-17. In the face of a clear congressional intent to establish such a dual system of federal and state regulation, the Court concluded that federal preemption could not be imposed over the intent of Congress to preserve state regulatory authority. *Id.* at 216. In reaching this conclusion, the Court noted that an express reservation of state authority obviates any need to inquire into the tangential effects that state regulation might have on federal regulatory jurisdiction. *Id.*

Thus, this Court has examined statutory schemes similar to the HMTA, and has consistently held that broad preemption language, such as the FRSA preemption of state "laws relating to railroad safety," cannot be interpreted as overriding a specific statutory reservation of state authority. The HMTA clearly provides such an express reservation of state authority to consistently regulate the intermodal transportation of hazardous materials.

C. The decision of the lower court conflicts with the decisions of this Court in *Louisiana* and *Pacific Gas*.

The lower court declined to apply the decisions of this Court, based upon an illusory distinction. In this regard, the lower court found that:

> In this case, federal power to regulate transportation of hazardous materials is absolute; state power is limited. Thus, unlike *Louisiana Public Service* where the Court was concerned that '. . . a federal agency may preempt state law only when and if acting within the scope of its congressionally delegated authority,' 476 U.S. at 374, 106 S.Ct. at 1901, we have no qualms about the scope of the

> DOT's authority to promulgate hazardous material transportation regulations. The only question is whether the PUCO also may do so for railroads.
>
> In *Pacific Gas & Electric*, the state had express power to regulate the economics of nuclear production. 461 U.S. at 205-06, 103 S.Ct. at 1722-23. The federal law, the Atomic Energy Act, did not explicitly prohibit states from exercising economic regulation. The question before the *Pacific Gas & Electric* Court was whether federal regulatory authority over nuclear production preempted a state regulation which arguably came within the express state authority. Again, the question before us is different. The federal government clearly has the power to regulate all aspects of railroad safety; state power is limited. Thus, the HMTA does not present the same type of dual regulatory authority presented in *Louisiana Public Service* or *Pacific Gas & Electric*.

CSX Transp., Inc. v. Public Utilities Comm'n of Ohio, 901 F. 2d at 497, 502 (6th Cir. 1990). The effect of the lower court's analysis of *Louisiana* and *Pacific Gas* is to deny the states' historic police power, and limit the Court's decisions to the specific statutory schemes examined in those cases. No such limitation was imposed by this Court.

Rather, this Court has consistently emphasized that in reviewing preemption cases, courts must start with the *assumption* that the historic police power of the states is not to be superceded by federal enactments "unless that was the clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Clearly, an express grant of federal statutory authority to the states is not necessary to avoid preemption. The states' police power is assumed; the only relevant question is whether Congress has exhibited an intention to displace that police power.

Thus, regarding the applicability of the *Louisiana* decision, the lower court simply begged the question by noting that with respect to hazardous materials, "federal power . . . is absolute; state power is limited." *CSX*, 901 F. 2d at 502. In *Louisiana*, the decision of this Court turned upon the fact that Congress had specifically preserved state authority from preemption, not the fact that federal power

was limited by such a reservation of authority to the states. *Louisiana*, 476 U.S. at 373. The limitation on federal authority was examined in order to determine what authority Congress had reserved to the states. Thus, this Court noted that "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Louisiana*, 476 U.S. at 374.

Had the lower court *applied* the *Louisiana* test, a different result would have been reached. The "nature and scope" of the authority granted by Congress to the Secretary under the HMTA was limited to regulating the transportation of hazardous materials on an intermodal basis, and preempting inconsistent state regulations. *See* 49 U.S.C.App. §§ 1801, 1802, 1811(a). The FRSA clearly does not convey congressional authority upon the Secretary to either regulate the intermodal transportation of hazardous materials, or to preempt state requirements that are preserved by the HMTA. *See* 45 U.S.C. § 434; 49 U.S.C. § 103(c) (1982 & Supp. V 1987).

The lower court recognized that with enactment of the HMTA, "the regulation of the transportation of hazardous materials moved from a modal to an intermodal basis." *CSX*, 901 F. 2d at 500. Further, the lower court recognized that the "HMTA allows state regulations which are consistent with federal regulations." *Id.* at 501. Nonetheless, the lower court found preemption, and attempted to distinguish *Louisiana*, based upon the authority granted to the Secretary by the FRSA, a modal enabling statute applying only to railroad safety.

Contrary to the lower court's analysis, this Court found in *Louisiana* that like the HMTA, the Communications Act required a dual system of regulation in an area where federal and state jurisdictions necessarily overlap:

> However, while the Act would seem to divide the world of domestic telephone service neatly into two hemispheres—one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction—in practice, the realities of technology and economics belie such a clean parceling of responsibility. This is so because virtually all

> telephone plant that is used to provide intrastate service is also used to provide interstate service, and is thus conceivably *within the jurisdiction of both state and federal authorities*. Moreover, because the same carriers provide both interstate and intrastate service, actions taken by federal and state regulators within their respective domains necessarily affect the general financial health of those carriers, and hence their ability to provide service, in the other "hemisphere."

Louisiana, 476 U.S. at 360 (emphasis added). Thus, the fact that "federal power is absolute" and "state power is limited" under the HMTA, has no bearing on the applicability of *Louisiana*. By limiting federal preemption to *inconsistent state laws*, Congress expressly preserved a measure of state police power authority to enforce consistent state requirements. In the case at bar, as in *Louisiana*, the "dual system of regulation" established by Congress applies to the joint regulation of one subject, defines the reach of federal jurisdiction, and preserves a measure of the states' police power to regulate that same subject. There is simply no basis for the lower court's conclusion that the system of regulation created by the HMTA "is of a different character than that at issue in *Louisiana*." *CSX*, 901 F. 2d at 502.

Similarly, in *Pacific Gas*, the fact that federal power was "absolute" had no bearing on this Court's decision. Specifically, this Court found that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas*, 461 U.S. at 212. Despite such "absolute" federal power, the Court declined to preempt state laws within the sphere of statutory authority reserved to the states by Congress. *Id.* at 213-16.

Further, in *Pacific Gas*, this Court expressly held that an affirmative grant of congressional authority to the states was not necessary in order to avoid preemption. The Court noted that although Congress had not affirmatively granted regulatory authority to the states, by reserving state authority to regulate the economics of nuclear energy production, Congress "underscored the distinction . . . between the spheres of activity left respectively to the Federal Government and the States." *Pacific Gas*, 461 U.S. at 210.

In enacting the HMTA, Congress created the same type of distinction found by this Court in *Louisiana* and *Pacific Gas*. The federal government was granted authority to regulate the intermodal transportation of hazardous materials. 49 U.S.C.App. §§ 1801, 1802. Although affirmative regulatory authority was not granted to the states, the authority of the federal government was expressly limited to preemption of inconsistent state intermodal hazardous materials requirements. 49 U.S.C.App. § 1811(a). In the case below, the lower court expanded the authority of the federal government, beyond that conferred by the HMTA, to preempt all state intermodal hazardous materials requirements related to rail transportation, whether consistent with the HMTA or not. This Court should not permit its precedential decisions, and the express requirements of the HMTA, to be ignored.

II. The decision of the lower court raises an important question of federal law that should be settled by this Court.

The lower court correctly found that the HMTA requires that the transportation of hazardous materials, by any mode, including rail, must be regulated on an intermodal basis. *CSX Transp., Inc. v. Public Utilities Comm'n of Ohio*, 901 F. 2d 497, 500 (6th Cir. 1990). Further, the lower court correctly found that "the HMTA allows state regulations which are consistent with federal regulations." *Id*. at 501.

With regard to the FRSA, the lower court correctly found that the statutory authority of the United States Secretary of Transportation, and the Federal Railroad Administration, is expressly limited under the FRSA to the modal regulation of railroad safety. *Id*. at 500. Further, the lower court correctly found that in enacting the HMTA in 1974, Congress expressly removed the transportation of hazardous materials from the purview of the FRSA. *Id*.

The lower court framed the legal issue, as follows:

> The question before us is simply this: should a train carrying a load of hazardous waste be considered a railroad which happens to be carrying hazardous waste (thus suggesting application of the FRSA preemption provision) or hazardous waste

which happens to be carried by rail (thus suggesting application of the HMTA preemption provision)?

CSX, 901 F. 2d at 501. Congress answered this question by requiring intermodal regulation of the transportation of hazardous materials under the HMTA; by expressly removing the HMTA from the "laws relating to railroad safety" comprising the Secretary's authority under the FRSA; and, by expressly preserving state intermodal hazardous materials laws that are consistent with the HMTA.

The lower court erred by concluding that the general preemption provision of the FRSA may be construed as the intention of Congress to preempt state intermodal hazardous materials laws that are expressly preserved by the HMTA. *Id.* The effect of the lower court decision is to render null the express requirements of the HMTA preserving consistent state laws, and requiring that the transportation of hazardous materials be regulated only on an intermodal basis.

A. In enacting the HMTA, Congress expressly required that the transportation of hazardous materials be regulated only on an intermodal basis.

The very purpose of enactment of the HMTA was to require that the transportation of hazardous materials be regulated only on an intermodal basis. As expressly noted in the first section of the HMTA, it is "the policy of Congress in this chapter to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." 49 U.S.C.App. § 1801.

In recognition of the fact that a single shipment of hazardous materials is routinely transported by several different modes of transportation (i.e., motor carrier to railroad), Congress applied the HMTA to "any movement of property by any mode, and any loading, unloading, or storage incidental thereto." 49 U.S.C.App. § 1802(6). Thus, the HMTA governs the regulation of shippers of hazardous materials, manufacturers of containers by which such materials are shipped, and transporters by any mode. 49 U.S.C.App. § 1804(a).

Prior to enactment of the HMTA, the transportation of hazardous materials was regulated, on a separate modal basis, by several modal administrations of the Department of Transportation, exercising the statutory authority of the Secretary. In this regard, the statutory authority of the Secretary to regulate the transportation of hazardous materials, the Explosives and Other Dangerous Articles Act, was delegated to the Federal Railroad Administration. The lower court correctly noted this legislative history of the HMTA:

> In 1966, Congress created the Department of Transportation (DOT). *See* 49 U.S.C. §§ 1651-1660, as amended. The DOT received the authority under several laws previously vested in a number of government agencies and departments to regulate, among other things, the transportation of hazardous materials. P.L. 89-670, 49 U.S.C. 1651 (1966). The authority to regulate under one of these laws, the Explosives and Other Dangerous Articles Act, was transferred from the Interstate Commerce Commission. 49 U.S.C. § 1655(e)(4).
>
> This authority to regulate, among other things, the transportation of hazardous materials transferred to the Secretary was delegated by statute to modal administrations (in this case, the Federal Railroad Administration and the Federal Highway Administration). The Federal Railroad Administration (FRA) had authority to promulgate hazardous material transportation regulations for railroads through its administration of the Explosives Act. 49 U.S.C. § 1665(f)(3)(A) (1966), *amended by* 49 U.S.C. § 1655(f)(3)(A) (1974). The Federal Highway Administration (FHA) had similar authority for motor carriers. 49 U.S.C. § 1655(f)(3)(B) (1966), *amended by* 49 U.S.C. § 1655(f)(3)(B) (1974). In both cases, the Secretary had no power either to retain the authority or transfer it to a modal administration other than the FRA (for railroads) or FHA (for motor carriers). 49 U.S.C. § 1655(f)(3) (1966), *amended by* 49 U.S.C. § 1655(f)(3) (1974).

CSX, 901 F. 2d at 499-500.

Further, the lower court correctly found that with the enactment of the HMTA in 1974, Congress expressly removed the authority of the Secretary to regulate the transportation of hazardous materials on a modal basis. As noted by the lower court:

> The HMTA amended the DOT enabling act to prohibit the Secretary from delegating the functions, powers, and duties to administer the Explosives Act to the FRA or the FHA. Pub. L. 93-633, § 113(e)(1), (2). The amended provision read in relevant part for the FRA:
>
> > The Federal Railroad Administrator shall carry out the functions, powers, and duties of the Secretary pertaining to railroad safety as set forth in the statutes transferred to the Secretary by subsection (e) of this section (other than [the Explosives and Other Dangerous Articles Act]).
>
> 49 U.S.C. § 1655(f)(3)(A). *Thus, the regulation of the transportation of hazardous materials moved from a modal to an intermodal basis.*

CSX, 901 F. 2d at 500 (emphasis added).

Notwithstanding its own findings that with the enactment of the HMTA Congress expressly withdrew the statutory authority of the Secretary to regulate the transportation of hazardous materials on a modal basis, and expressly required intermodal regulation under the HMTA, the lower court failed to apply its own correct analysis. In this regard, the lower court reached the anomalous conclusion that the Secretary may preempt state hazardous materials laws pursuant to the FRSA, regardless of the fact that the Secretary has no statutory authority to regulate the transportation of hazardous materials under the FRSA:

> Although we credit the PUCO's compelling argument that the creation of the HMTA in 1974 removed promulgation (though not enforcement) of regulations under the Explosives Act from the FRA, we do not believe that such removal changes the fact that FRSA preemption relates to *all* rules and regulations regarding railroad safety *promulgated by*

> *the Secretary*, whether or not such regulations are promulgated by the FRA through power delegated by the Secretary. *See* 45 U.S.C. § 434. Clearly, the HMTA is a law relating to railroad safety, even if regulations pursuant to it are promulgated by the Secretary directly, not by the FRA.

CSX, 901 F. 2d at 501.

The analysis by the lower court overlooked the fact that the HMTA did not merely transfer regulatory authority over hazardous materials from the FRA to the Secretary. In enacting the HMTA, Congress expressly removed the regulatory authority of the *Secretary* from the general modal safety statutes, including the FRSA, and required that the regulation of hazardous materials transportation be addressed on an intermodal basis.

The Secretary is required by statute to delegate regulatory authority over general modal safety to the modal administrations. *See, e.g.*, 49 U.S.C. § 103(c) (1982 & Supp. V 1987). The Secretary has no statutory authority under the FRSA separate from that exercised by the Federal Railroad Administration. *Id.* It is incongruous to conclude, as did the lower court below, that Congress intended to preempt state intermodal hazardous materials regulations by means of a statue under which the authority of the Secretary to regulate hazardous materials transportation was expressly removed. The only statutory authority granted to the Secretary to regulate hazardous materials transportation is contained in the HMTA, under which Congress expressly required intermodal regulation, and expressly preserved consistent state laws.

B. Congress has specifically defined the scope of preemption under the FRSA to exclude state laws expressly preserved by the HMTA.

The lower court was able to reach the inconsistent conclusion that Congress intended the FRSA to preempt state intermodal hazardous materials laws only by ignoring the express provisions of the HMTA, and by misconstruing the preemption provision of the FRSA. The court found that the following language of the FRSA exhibited the manifest intent of Congress to preempt state intermodal hazardous materials laws: "A State may adopt or

continue in force any law, rule, regulation, order, or standard *relating to railroad safety* until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434 (emphasis added).

Specifically, the lower court mistakenly concluded "that FRSA preemption relates to *all* rules and regulations regarding railroad safety," and that "the HMTA is a law relating to railroad safety." CSX, 901 F. 2d at 501. In reaching this conclusion, the lower court disregarded the fact that Congress has expressly defined the "laws relating to railroad safety" that comprise the Secretary's statutory authority under the FRSA, and has specifically excluded the HMTA.

The congressional purpose to preempt state laws "relating to railroad safety," as expressed in 45 U.S.C. § 434, is clearly defined and delimited by the general authority conveyed upon the Secretary by the FRSA to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970." 45 U.S.C. § 431(a). When the FRSA was enacted in 1970, the only existing statute governing the transportation of hazardous materials, the Explosives and Other Dangerous Articles Act, was included within the statutes supplemented by the FRSA. In 1974, statutory authority for the regulation of hazardous materials was expressly removed from the FRSA, and consolidated on an intermodal basis in the HMTA. 49 U.S.C. § 1655(f)(3)(A) (1966), *amended* by 49 U.S.C. § 1655(f)(3)(A) (1974) (repealed 1983). Congress limited the authority of the Secretary to preempt state hazardous materials requirements to the intermodal authority granted by the HMTA, by expressly excluding the Explosives Act from the list of laws relating to railroad safety that comprised the Secretary's authority under the FRSA.

In this regard, with enactment of the HMTA, Congress limited the statutory authority of the *Secretary* that could be delegated for administration under the FRSA, as follows:

> The Federal Railroad Administrator shall carry out the functions, powers, and duties of the Secretary *pertaining to railroad safety* as set forth in the statutes transferred to the Secretary by subsection (e) of this section (*other than [the Explosives and Other Dangerous Articles Act]*).

49 U.S.C. § 1655(f)(3)(A) (1966) *amended by* 49 U.S.C. § 1655(f)(3)(A) (1974))(repealed 1983) (emphasis added).

The lower court recognized that "[t]he HMTA amended the DOT enabling act to prohibit the Secretary from delegating the functions, powers, and duties to administer the Explosives Act to the FRA . . . ." *CSX*, 901 F. 2d at 500. Accordingly, the lower court's finding of FRSA preemption was based upon the statutory authority of the Secretary, under a statute that Congress clearly amended to exclude any authority to regulate the intermodal transportation of hazardous materials.

In 1980, Congress again amended several provisions of the FRSA. Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, 94 Stat. 1811 (1980), (amending 45 U.S.C. §§ 431-443). The 1980 amendments clarified the congressional intention to limit both preemption and state participation to the specific "laws related to railroad safety" supplemented by the FRSA. In this regard, the 1980 amendments expanded both the authority of the Secretary, and the authority of the states to participate in certified enforcement under the FRSA, by incorporating those laws which had only been "supplemented" in the original 1970 enactment. Once again, the regulation of hazardous materials transportation was not considered germane to either the authority of the Secretary, or to the preemption and participation of the states, under the FRSA definition of "laws relating to railroad safety."[2] This fact was expressly noted in the legislative history:

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2 Previously, state enforcement of federal railroad safety requirements was limited to regulations promulgated under the FRSA: "A state may participate in carrying out investigative and surveillance activities in connection with any rule . . . *under this subchapter*." 45 U.S.C. § 435(a) (emphasis added). The 1980 amendments clarified state authority under the FRSA "laws relating to railroad safety," excluding any state enforcement of regulations promulgated under the HMTA:

> In addition to the provisions for State participation set forth in subsections (a) and (c) of this section, the Secretary may enter into agreements with any State to provide investigative and surveillance activities with respect to those functions transferred to the Secretary by section 1655(e)(1), (e)(2), and (e)(6)(A) of Title 49 ["railroad safety laws" listed in the Department of Transportation Act].

Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, 94 Stat. 1811 (1980) (enacting 45 U.S.C. § 435(g)).

> Section 4 changes existing law by expanding the permissible scope of state participation in railroad safety activity under the State safety participation program. Currently, states can only participate in investigation and enforcement activity under the 1970 Safety Act and regulations thereunder. Existing law does not allow state participation with regard to the earlier safety laws. These laws are the Safety Appliance Acts (45 U.S.C. 1-16), Locomotive Inspection Act (45 U.S.C. 22-34), Signal Inspection Act (49 U.S.C. 26), Hours of Service Act (45 U.S.C. 61-64b), and Accident Reports Act (45 U.S.C. 38-43). This section would make it clear that the states could participate in investigation and enforcement activities under these other railroad safety laws. *Since the Hazardous Materials Transportation Act is not directed specifically and solely at railroad safety, that Act is not within the scope of the amendment.*

H. R. Rep. No. 1025, 96th Cong., 2d Sess. 13, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3830, 3837-38 (emphasis added).

Similarly, Congress granted the same authority to the Secretary, and clarified the duties of the Secretary with respect to "railroad safety" under the FRSA without regard to the intermodal regulation of hazardous materials transportation. As noted in the legislative history:

> Section 6 [amending 45 U.S.C. § 437] would consolidate and clarify the general powers *available to the Secretary in carrying out his duties with respect to railroad safety within the [Federal Railroad] Safety Act.*
>
> Subsection 6(a) of the bill includes within section 208(b) of the Safety Act (45 U.S.C. 437(b)) the inspection authority available to the Secretary for the purpose of carrying out his duties under the Safety Appliance Acts, the Locomotive Inspection Act, the Hours of Service Act, the Accident Reports Act, and the Signal Inspection Act. These duties had been transferred to the Secretary from the Interstate Commerce Commission by the Department of Transportation Act.

Id. at 3839 (emphasis added).

Thus, both the authority of the Secretary and participating states under the FRSA was clarified by reference to the Department of Transportation Act, which incorporated "laws relating generally to safety appliances and equipment on railroad engines and cars," and transferred the administration of such laws from the ICC to the Secretary. In this regard, both of the 1980 amendments clarifying the purpose of the FRSA referred to the functions transferred to the Secretary by sections 6(e)(1), (e)(2), and (e)(6)(A) of the Department of Transportation Act (49 U.S.C.App. §§ 1655 (e)(1), (e)(2), and (e)(6)(A)). *See* 45 U.S.C. §§ 435(g), 437(b). The Department of Transportation Act, in pertinent part, provided that:

> (e) There are hereby transferred to and vested in the Secretary all functions, powers, and duties of the Interstate Commerce Commission, and of the Chairman, members, officers, and offices thereof, under —
>
> (1) the following laws *relating generally to safety appliances and equipment on railroad engines and cars*, and protection of employees and travelers:
>
> (A) The Act of March 2, 1893, as amended (27 Stat. 531; 45 U.S.C. 1 et seq.) [Safety Appliance Act].
>
> (B) The Act of March 2, 1903, as amended (32 Stat. 943; 45 U.S.C. 8 et seq.) [Safety Appliance Act].
>
> (C) The Act of April 14, 1910, as amended (36 Stat. 298; 45 U.S.C. 11 et seq.) [Safety Appliance Act].
>
> (D) The Act of May 30, 1908, as amended (35 Stat. 476; 45 U.S.C. 17 et seq.) [Safety Appliance Act].
>
> (E) The Act of February 17, 1911, as amended (36 Stat. 913; 45 U.S.C. 22 et seq.) [Locomotive Inspection Act].
>
> (F) The Act of March 4, 1915, as amended (38 Stat. 1192; 45 U.S.C. 30) [Locomotive Inspection Act].

(G) Reorganization Plan No. 3 of 1965 (79 Stat. 1320).

(H) Joint Resolution of June 30, 1906, as amended (34 Stat. 838; 45 U.S.C. 35) [Accident Reports Act].

(I) The Act of May 27, 1908, as amended (35 Stat. 325; 45 U.S.C. 36 et seq.) [Accident Reports Act].

(J) The Act of March 4, 1909, as amended (35 Stat. 965; 45 U.S.C. 37) [Accident Reports Act].

(K) The Act of May 6, 1910, as amended (36 Stat. 350; 45 U.S.C. 38 et seq.) [Accident Reports Act].

(2) the following law relating generally to hours of service of employees: The Act of March 4, 1907, as amended (34 Stat. 1415; 45 U.S.C. 61 et seq.) [Hours of Service Act].

. . .

(4) *the following provisions of law relating generally to explosives and other dangerous articles: Sections 831-835 of Title 18 [the Explosives and Other Dangerous Articles Act].*

. . .

(6) the following provisions of the Interstate Commerce Act, as amended ---

(A) relating generally to safety appliances methods and systems: Section 25 (49 App.U.S.C. 26) [Safety Appliance Act].

49 U.S.C.App. § 1655(e) (repealed in part 1983) (emphasis added).

Three aspects of the 1980 amendments of the Department of Transportation Act are especially noteworthy. First, Congress expressly indicated that the purpose of the amendments was to "clarify the general powers available to the Secretary in carrying out his duties with respect to railroad safety within the [Federal

Railroad] Safety Act."[3] Secondly, Congress expressly noted that the HMTA was not within the scope of the clarifying amendments. And finally, Congress clarified the intent of the FRSA by reference to "laws relating generally to safety appliances and equipment on railroad engines and cars, and protection of employees and travelers," and specifically excluded any reference to either the Explosives and Other Dangerous Articles Act, a hazardous materials transportation statute within the same subsection as the referenced "laws relating generally to safety appliances and equipment," or to the HMTA. *Compare* 49 U.S.C.App. § 1655(e)(1), (e)(2), (e)(6)(A) *with* 49 U.S.C.App. § 1655(e)(4) (repealed 1983). Thus, the "list of other railroad safety statutes" to be supplemented by the FRSA was expressly incorporated into the FRSA, and the statutory basis for intermodal hazardous materials regulation was expressly excluded from the "laws relating to railroad safety" that comprise the Secretary's statutory authority under the FRSA.

Finally, in amending the FRSA in 1980, Congress conclusively demonstrated that the HMTA was not to be considered as a "law relating to railroad safety" under the FRSA, *unless Congress expressly required otherwise.* In this regard, Congress included the HMTA within only one section of the FRSA:

> *As used in this section,* the term 'Federal railroad safety laws' means this Act, the Hazardous Materials Transportation Act (49 U.S.C. 1801 *et seq.*), and those laws transferred to the jurisdiction of the Secretary of Transportation by subsection (e)(1), (2), and (6)(A) of section 6 of the Department of Transportation Act (49 U.S.C. 1655(e)(1), (2), and (6)(A)).

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3 H.R. Rep. No. 1025, 96th Cong., 2d Sess. 13, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3830, 3839. It is important to note that in defining its own authority, the FRA expressly recognizes its limited authority to enforce regulations under the HMTA, *separate from* its general regulatory authority for railroad safety under the FRSA statutorily delegated from the Secretary:

> By delegation from the Secretary of Transportation, the Administrator has responsibility for: (a) *Enforcement* of Subchapters B and C of Chapter I, Subtitle B, Title 49, CFR, with respect to the transportation or shipment of hazardous materials by railroad (49 CFR 1.49(s)); (b) *Exercise of the authority* vested in the Secretary by the Federal Railroad Safety Act of 1970, 45 U.S.C. 421, *et seq.* (49 CFR 1.49(m)).

49 C.F.R. § 209.1 (emphasis added).

Federal Railroad Safety Authorization Act of 1980, § 10(e), Pub. L. No. 96-423, 94 Stat. 1811 (1980) (codified at 45 U.S.C. § 441(e)) (emphasis added).

Clearly, had Congress considered the FRSA to be generally applicable to the intermodal regulation of hazardous materials transportation, there would have been no need to expressly include the HMTA in one specific section of the FRSA, or to limit the definition to that particular section. Neither the FRSA generally, nor the preemption provision of the FRSA, was intended by Congress to apply to consistent state enforcement of federal intermodal hazardous materials requirements.

It is difficult to imagine a more conclusive expression of the legislative intention to separate the general safety authority over railroads under the FRSA, from the specific intermodal authority over the regulation of hazardous materials transportation contained within the HMTA. Unquestionably, the authority of the Secretary under the FRSA, state participation authority under the FRSA, and federal preemption of state laws under the FRSA, were intended by Congress to exclude any consideration of the transportation of hazardous materials. Congress expressly recognized and reserved the intermodal regulation of hazardous materials to the HMTA.

As it stands today, the Secretary is empowered under the FRSA to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for *all areas of railroad safety* supplementing provisions of law and regulations in effect on October 16, 1970." 45 U.S.C. § 431(a) (emphasis added). "All areas of railroad safety" is expressly defined without reference to the regulation of hazardous materials transportation. 45 U.S.C. § 431(k). The HMTA, enacted in 1974, is clearly not a law that was "in effect on October 16, 1970."

As noted by Congress, "the general powers available to the Secretary in carrying out his duties with respect to *railroad safety* within the [Federal Railroad] Safety Act," is clarified by 45 U.S.C. § 437. H.R. Rep. No. 1025, 96th Cong., 2d Sess. 14, *reprinted in* U.S. Code Cong. & Admin. News 3830, 3839. In this regard, the Secretary has broad authority "to issue orders directing compliance with this chapter or with any *railroad safety* rule, regulation, order, or standard *issued under this chapter*." 45 U.S.C. § 437(a) (emphasis added). The FRSA conveys broad inspection authority "[t]o carry out the Secretary's responsibilities *under this subchapter and under the functions transferred by section 1655(e)(1), (e)(2), and (e)(6)(A) of*

Title 49." 45 U.S.C. § 437(b) (emphasis added). Neither the Secretary, nor the FRA by statutory delegation, has any authority to regulate the intermodal transportation of hazardous materials as an area of "railroad safety" under the FRSA.

The authority of the states to participate in "investigative and surveillance activities" under the FRSA is also defined "with respect to those functions transferred to the Secretary by section 1655(e)(1), (e)(2), and (e)(6)(A)." 45 U.S.C. § 435(g). *See also* 45 U.S.C. § 436(a)(1), (b)(1). Similarly, the jurisdiction of the United States district courts to enforce the orders of the Secretary is defined by reference to orders "under this subchapter," and under the laws transferred by section 1655(e)(1), (e)(2), and (e)(6)(A) of Title 49. 45 U.S.C. § 437(a), (d)(1), (d)(2); 45 U.S.C. § 439(a).

Thus, in requiring preemption of state "laws, rules, regulations, orders, and standards *relating to railroad safety*," Congress clearly defined "railroad safety" as the specific subjects addressed by the provisions of the FRSA and Sections 1655(e)(1), (e)(2), and (e)(6)(A) of Title 49. 45 U.S.C. § 434. Congress expressly excluded intermodal hazardous materials regulations from the definition of "laws. . . relating to railroad safety." 49 U.S.C. § 103(c)(1) (1982 & Supp. V 1987). As recently as 1983, Congress recodified 49 U.S.C. § 1655(f)(3)(A), and again expressly defined "railroad safety" as excluding hazardous materials regulation under the HMTA:

> (c) The [Federal Railroad] Administrator shall carry out—
>
> (1) duties and powers related to railroad safety vested in the Secretary by section 6(e)(1), (2), and (6)(A) of the Department of Transportation Act (49 App.U.S.C. 1655(e)(1), (2), and (6)(A)).

49 U.S.C. § 103(c)(1) (1982 & Supp. V 1987). Neither the Explosives Act, nor the HMTA, were included by Congress in the statutes comprising the authority over "railroad safety vested in the Secretary" under the FRSA. The preemption of state hazardous materials requirements has clearly been left to the express provisions of the HMTA.

The clear and manifest intent of Congress requires that questions of federal preemption of state intermodal hazardous materials laws be resolved by reference to the only federal statute that governs the intermodal transportation of hazardous materials,

the HMTA. In enacting the HMTA, Congress expressly removed from the FRSA any statutory authority to either regulate the transportation of hazardous materials, or to preempt state hazardous materials laws. Congress expressly required that hazardous materials transportation be regulated under the HMTA on an intermodal basis, and expressly preserved the authority of the states to regulate the intermodal transportation of hazardous materials in a manner consistent with the HMTA.

C. The decision of the lower court created a statutory conflict between the HMTA and the FRSA, and resolved that conflict by nullifying the requirements of the HMTA.

Despite finding that in enacting the HMTA, Congress removed the statutory authority of the Secretary from the respective modal safety statutes, including the FRSA, the lower court applied the preemption provision of the FRSA to state intermodal hazardous materials requirements. The effect of this misconstruction is to defeat both the congressional purpose of the HMTA to require intermodal regulation, and the express congressional intent to provide for consistent state regulation.

The rule of statutory construction that should govern this case is that such a preemption analysis "is also to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " *Merrill Lynch v. Ware*, 414 U.S. 117, 127 (1973) (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) (citations omitted)). Thus, in *Louisiana*, this Court held that where a finding of preemption necessitated a finding that two federal statutes were in conflict, the statutory provisions should be reconciled, if possible, to preserve the authority of the state, and to avoid the conflict. *Louisiana*, 476 U.S. at 370. The lower court agreed with this rule of statutory construction, but then ignored it. *CSX*, 901 F. 2d at 502.

Specifically, the lower court found that:

> A failure to follow the preemption provision of the HMTA in no respect ousts the HMTA. In this case, the decision of the district court, applying the FRSA preemption provision to regulations promulgated

> under the HMTA, retains the essential character and purpose of both statutes. The national character of railroad regulation and the need for regulation of hazardous material transportation on an intermodal basis are both respected.

CSX, 901 F. 2d at 503.

The conclusion of the lower court is wrong. In expressly requiring that the transportation of hazardous materials, *by any mode*, be regulated under the HMTA, Congress did not create an exception for hazardous materials transported by rail. By expressly preserving consistent state intermodal hazardous materials regulations, Congress did not intend to preempt those same state requirements by means of an earlier statute that addresses a different subject.

By first concluding that the HMTA is a "law relating to railroad safety" under the FRSA, the lower court necessarily concluded that the two federal statutes were in conflict. *CSX*, 901 F. 2d at 501. As the lower court noted, "unlike the preemption provision of the FRSA, which forbids state regulation on subject matter on which the Secretary has already adopted a regulation, the HMTA allows state regulations which are consistent with federal regulations." *Id.* The lower court "resolved" this conflict by nullifying the express requirements of the HMTA.

If the HMTA is not properly considered to be one of the "railroad safety laws" comprising the Secretary's authority under the FRSA, there is no conflict between the respective preemption provisions. The FRSA preempts state laws "relating to railroad safety" where the Secretary has promulgated a regulation under the FRSA "covering the subject matter." The HMTA preempts inconsistent state intermodal hazardous materials requirements, and preserves the states' authority to enforce consistent intermodal regulations.

While the lower court was correct that its decision does not completely oust the HMTA, it certainly does so with respect to any state enforcement of federal intermodal regulations that apply to the transportation of hazardous materials by rail. The effect of this decision is to render the statutory scheme of the HMTA anomalous, and unworkable, subjecting state citizens to the harm that congress intended to preclude through enactment of the HMTA.

Under the provisions of the HMTA left undisturbed by the lower court, states retain the right to regulate, consistent with the requirements of the HMTA, shippers of hazardous materials, manufacturers of containers by which such materials are shipped, and transporters by any mode, except railroad. 49 U.S.C.App. § 1804(a). Thus, the decision of the lower court results in the anomalous situation of consistent state regulations applying to the container in which a particular shipment of hazardous materials is packaged, to the shipper, to the motor carrier who would transport the shipment to the railyard, and to the motor carrier who would transport the shipment from the railyard—but not to the transporting railroad. It defies reason to believe that Congress would have required this result without creating an express exception for railroads.

Thus, "the need for regulation of hazardous materials transportation on an intermodal basis," expressly recognized by Congress, was clearly not "respected" by the lower court. In contravention of the intent of Congress, the lower court prohibited the states from enforcing intermodal hazardous materials requirements that are consistent with the HMTA. The decision of the lower court should be reversed.

CONCLUSION

The decision of the lower court defeats the manifest intention of Congress, prohibiting the sovereign states from protecting their citizens from the very real threat posed by the daily transportation of toxic and explosive substances through their communities. Congress clearly did not envision such a result, and this Court should not permit it to stand.

For the foregoing reasons, Petitioners respectfully submit that this petition for certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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In The
Supreme Court of the United States

OCTOBER TERM, 1989

THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC., *et al.*,

Respondents.

Appendix

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CSX TRANSPORTATION, INC., et al., Plaintiffs,

v.

The PUBLIC UTILITIES COMMISSION OF OHIO, et al., Defendants.

No. C2-88-1023.

United States District Court, S.D. Ohio, E.D.

Dec. 12, 1988.

OPINION AND ORDER

GRAHAM, District Judge.

In 1970 Congress enacted the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 421 *et seq.* which authorized the Secretary of the Department of Transportation to adopt railroad safety regulations. Congress included in that act broad preemption provisions excluding the states from legislating in any area of railroad safety already covered by regulations adopted by the Secretary. In 1974 Congress enacted the Hazardous Materials Transportation Act (HMTA), 49 U.S.C.App. § 1801 *et seq.* authorizing the Secretary to adopt rules and regulations governing the transportation of hazardous materials by any mode of transportation. The preemption provisions of the HMTA permit the states to adopt and enforce their own laws and rules regulating the transportation of hazardous materials so long as they are not inconsistent with federal rules adopted under the HMTA. This case presents the question of whether state legislation regulating the transportation of hazardous materials by rail is governed by the strict preemption provisions of the FRSA or by the more liberal preemption provisions of the HMTA.

The State of Ohio has recently passed legislation incorporating into Ohio law the federal regulations adopted by the Secretary of Transportation under the HMTA relating to the transportation of hazardous materials by rail. *See* Ohio Rev.Code § 4907.64 (effective September 26, 1988) (authorizing the Public

Utilities Commission of Ohio (PUCO) to adopt railroad safety laws "consistent with, and equivalent in scope, coverage, and content to, the provisions of the [HMTA], and regulations adopted under it."); Ohio Admin.Code § 4901:3-1-10 (effective December 10, 1988) (adopting the provisions of the HMTA regulations contained in 49 C.F.R. §§ 171-179 governing the transportation of hazardous materials by rail). Ohio seeks to enforce these rules against railroads through its own system of enforcement, which includes civil penalties. *See* Ohio Rev.Code § 4905.83; Ohio Admin.Code §§ 4902:2-7-01 through 4901:2-7-22.

This legislation resulted from a study of state and federal hazardous materials regulation, enforcement and emergency response conducted by a group of state agencies collectively known as the Ohio Hazardous Substances Emergency Team (OHSET) which was formed in response to the July, 1986 disaster in Miamisburg, Ohio when a number of railroad cars operated by plaintiff CSX Transportation, Inc., derailed near Miamisburg, Ohio. A rail car containing phosphorous ignited and burned, spreading a cloud of toxic gas throughout the area and forcing the evacuation of 40,000 citizens. The Ohio act reflects the judgment of the executive and legislative branches of state government that federal enforcement of regulations governing hazardous materials transported by rail is inadequate.

Plaintiffs are four major railroads engaged in interstate rail transportation in and through Ohio who challenge the constitutionality of the newly enacted Ohio statutes and administrative regulations. Defendants are the PUCO, its chairman and commissioners. Plaintiffs challenge the Ohio statutes and regulations on the grounds that they violate the Supremacy Clause of the United States Constitution, the preemption provisions of the FRSA and the HMTA and on the further grounds that they impose an undue burden on interstate commerce. The matter is now before the Court on the plaintiffs' motion for summary judgment and the defendants' cross motion for summary judgment. In their motions, the parties seek summary judgment on the issue of federal preemption.

The United States Supreme Court has recently summarized the various tests enunciated for determining whether federal law has preempted state legislation:

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519, [97 S.Ct. 1305, 51 L.Ed.2d 604] (1977), when there is outright or actual conflict between federal and state law, *e.g., Free v. Bland*, 369 U.S. 663, [82 S.Ct. 1089, 8 L.Ed.2d 180] (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 [83 S.Ct. 1210, 10 L.Ed.2d 248] (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 [, 103 S.Ct. 2890, 77 L.Ed.2d 490] (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 [67 S.Ct. 1146, 91 L.Ed. 1447] (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52 [, 61 S.Ct. 399, 85 L.Ed. 581] (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141 [, 102 S.Ct. 3014, 73 L.Ed.2d 664] (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 [,104 S.Ct. 2694, 81 L.Ed.2d 580] (1984).

Louisiana Public Service Commission v. FCC, 476 U.S. 355 358-369, 106 S.Ct. 1890, 1989-99, 90 L.Ed.2d 369 (1986).

At the heart of each of these standards is the discernment of the true purpose of Congress. "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Commission*, 476 U.S. at 369, 106 S.Ct. at 1899.

The stated purpose of the FRSA is "to promote safety in all areas of railroad operations." 45 U.S.C. § 421. The Act requires the Secretary of Transportation to prescribe appropriate rules,

regulations, orders and standards for all areas of railroad safety and to conduct research, development, testing, evaluation and training in all areas of railroad safety. In 45 U.S.C. § 434 Congress declared its intention that laws, rules, regulations, orders and standards relating to railroad safety should be nationally uniform to the extent practicable. The statute reads as follow:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Thus, under 45 U.S.C. § 434, a state may legislate in areas relating to railroad safety only until such time as the Secretary has adopted a rule, regulation, order or standard covering the same subject matter. A state, within limitation, may adopt an additional or more stringent rule only when necessary to address a local safety hazard. This exception does not apply to this case.

The FRSA, however, does contemplate a limited state role in enforcement. Title 45, U.S.C. § 435 provides that a state may participate in investigation and surveillance in connection with any rule or standard prescribed by the Secretary under the FRSA pursuant to certification provisions contained in the statute. The section provides, however, that "the Secretary shall retain the exclusive authority to assess and compromise penalties ... for the violation of rules, regulations, orders, and standards prescribed by the Secretary" under the FRSA.

The stated purpose of the HMTA is "to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the trarsportation of hazardous materials in

commerce." 49 U.S.C.App. § 1801. The Act authorizes the Secretary to issue regulations for the safe transportation of hazardous materials which "shall be applicable to any person who transports . . . a hazardous material." 49 U.S.C.App. § 1804(a). The Act authorizes the Secretary to issue regulations governing not only the transportation of hazardous materials, but also their handling and the manufacture, repair and testing of the containers in which they are transported. 49 U.S.C.App. §§ 1804, 1805.

In 49 U.S.C.App. § 1811, Congress provided for preemption of state laws on the subjects covered by the HMTA only when they are inconsistent with the Act or regulations adopted pursuant to it.

> (a) Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted.

Section 49 U.S.C.App. § 1811(b) provides a procedure whereby a state may request the Secretary of Transportation to make an administrative determination whether or not a state requirement is inconsistent with the HMTA or a regulation adopted pursuant to it. The Secretary has delegated this authority to the Office of Hazardous Materials Transportation, Research and Special Programs Administration (RSPA), 49 C.F.R. § 107.201 *et seq.*

Acting pursuant to the HMTA, the Secretary has adopted a body of regulations defining hazardous materials, establishing requirements for the containers they are transported in, and regulating their transportation by any mode, including air, water, rail and highway. These regulations are known as the Hazardous Materials Rules (HMR) and they are found at 49 C.F.R. §§ 171-179. The HMR's which relate specifically to railroads are found at 49 C.F.R. § 174.

Plaintiffs contend that this case is controlled by the broad preemption provisions of FRSA and that Congress intended to preclude state regulation of the transportation of hazardous materials by rail. Plaintiffs argue that regulations relating to the transportation of hazardous materials by rail are regulations "relating to railroad safety" within the meaning of 45 U.S.C. § 434 and that the states are precluded thereby from adopting or enforcing dual standards which relate to the transportation of hazardous materials by rail. Defendants contend, on the other

hand, that Congress intended that the FRSA and its preemption provisions should apply only to general railroad safety regulations pertaining essentially to equipment, track and operating procedures whereas Congress addressed the subject of hazardous materials in the HMTA and intended that its preemption provisions should apply to such regulations.

It is clear that when Congress enacted the FRSA in 1970 it addressed not only general rail safety but also specifically addressed the transportation of hazardous materials.

> The Congress declares that the purpose of this Chapter [FRSA] is to promote safety in all areas of railroad operations . . . *and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials.*

45 U.S.C. § 421 (emphasis added). There is no dichotomy, as defendants suggest, between the FRSA and the HMTA, with the former limited to general railroad safety and the latter directed specifically toward the intermodal regulation of the transportation of hazardous materials. Indeed the regulation of the transportation of hazardous materials by rail is inextricably intertwined with the regulation of railroad equipment and operating procedures.

The legislative history of the FRSA evidences a clear Congressional intent that rail safety regulations be nationally uniform and that all enforcement should be by federal authorities.

> With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulations and enforcement. It is a national system. . . . In addition to the obvious areas of rolling stock and employees, such elements as operating rules, signal systems, power supply systems, and communication systems of a single company normally cross many State lines. To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R.Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.Code

Cong. & Admin.News 4104, 4110-4111.

> The Committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems. Accordingly, while it has preserved the framework of certification, it has modified the concept insofar as it applies to the nation's rail system to make all enforcement Federal in nature. The Secretary will have exclusive authority to assess and compromise penalties and to recommend court action for recovery of such penalties . . . [States] will have no authority to assess and compromise penalties or to seek State judicial action.

Id. at 4109.

The scope of preemption under the FRSA has been broadly construed by the courts. *See National Association of Regulatory Utility Commissioners v. Coleman*, 542 F.2d 11 (3d Cir.1976); *Chesapeake & Ohio Railway Co. v. City of Bridgman*, 669 F.Supp. 823, 825 (W.D.Mich.1987); *Consolidated Rail Corp. v. Pennsylvania Public Utility Commission*, 536 F.Supp. 653 (E.D.Pa.), *aff'd mem.*, 696 F.2d 981 (3rd Cir. 1982), *aff'd mem.* 461 U.S. 912, 103 S.Ct. 1888, 77 L.Ed.2d 280 (1983); *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 671 F.Supp. 466 (W.D.Tex.1987), *aff'd*, 850 F.2d 264 (5th Cir.1988).

As noted above, the preemption clause of the FRSA provides in part as follows:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement.

45 U.S.C. § 434. A central issue in this case is the meaning of the phrase "any law, rule, regulation, order or standard relating to railroad safety." The key components of the phrase are: "any law, etc.," "relating to," "railroad safety." These are words of broad meaning and in ordinary usage they would certainly include rules relating to the transportation of hazardous materials by rail. Defendants have a heavy burden to show that the phrase should be interpreted so as to exclude such rules.

The legislative history of FRSA indicates that Congress intended the phrase, "relating to railroad safety," as used in 45 U.S.C. § 434, to include intermodal safety regulations insofar as they apply to rail transport. For instance, Congress included in a list of "existing railroad safety laws" the Explosives and Other Dangerous Articles Act, a predecessor of the HMTA which provided for intermodal regulation of the transportation of hazardous materials. H.R.Rep. No. 1194, 91st Cong., 2d Sess. (Appendix B).

In 1980 when Congress defined the term "railroad safety laws" in the context of a "whistle blower" statute, the definition expressly included the HMTA. *See* 45 U.S.C. § 441(e). The statutes listed in this section are the same statutes set forth in the list mentioned in the preceding paragraph, except for the substitution of the HMTA for the Explosives Act.

The legislative history of the FRSA shows that the issue of federal preemption was vigorously debated, leaving a clear record of Congressional intent for virtually complete federal preemption in the area of railroad safety laws. The legislative history of HMTA, which was enacted just four years later, is devoid of any debate or discussion on the standard of preemption applicable to rules which regulate the transportation of hazardous materials by rail.

Representative Springer observed during the hearings on FRSA:

> *I think this [preemption] is the great area or problem,* Mr. Secretary where there would be a possibility, this is just opinion, but I think I can read that this would be the area probably where we might have the most agreement or disagreement about what ought to be done. *I think this is really what the turning point of the bill will be, in my opinion.*

Hearings Before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 43 (1970) (emphasis added).

Representative Kuykendall made the following comment:

> Yes. Mr. Reed, I think you have gathered-I know you were here this morning and heard the testimony and probably at least had representatives at some of the other sessions. There is not much disagreement with this bill and *it seems to me that almost the entire area of*

> *disagreement has now been pretty well isolated.* Disagreeing with your position on the overall goals of this bill would be just like disagreeing with God and motherhood. You just don't do it. *So let's get to the area of discussion of what we are faced with, the problem of preemption and authority of the different levels of regulatory agencies.*

See id. at 141 (emphasis added).

It would certainly seem that if Congress had intended rail safety regulations adopted under the HMTA to be subject to a different standard than the one so recently and vigorously debated during the adoption of the FRSA, then the legislative history would reflect such a decision. The absence of debate or comment on the issue of preemption of railroad regulations in the legislative history of the HMTA leads to the conclusion that in enacting the HMTA Congress must have intended that any rail safety regulations adopted pursuant to it would fall under the same preemption standard already established for all rail safety regulations under the FRSA.

Defendants are unable to point to any specific provision of the HMTA which negates the express preemption provisions of the FRSA. Defendants' argument is based upon an implied repeal of the preemption provisions of the FRSA by the more liberal preemption provisions of the HMTA. The implied repeal of an earlier statute by the mere enactment of a later, even potentially conflicting one, is disfavored and should be avoided whenever possible. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 104 S.Ct. 2862, 2878, 81 L.Ed.2d 815 (1984); *TVA v. Hill*, 437 U.S. 153, 189-190, 98 S.Ct. 2279, 2299-2300, 57 L.Ed.2d 117 (1987); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168-169, 96 S.Ct. 1319, 1322-23, 47 L.Ed.2d 653 (1976); *Davis v. Devine*, 736 F.2d 1108, 1114 (6th Cir.), *cert. denied.*, 469 U.S. 1020, 105 S.Ct. 436, 83 L.Ed.2d 362 (1984). Here, the most logical way to resolve any conflict is to give effect to the specific preemption language of the FRSA (which by its literal language applies to all rail safety regulations adopted by the Secretary) while applying the more liberal preemption standard of the HMTA to regulations adopted with respect to other modes of transportation.

Defendants point out that the HMTA transferred regulatory authority over hazardous materials transportation from the Federal

Railroad Administration (FRA) to the Secretary of the Department of Transportation and argue that this signifies a Congressional intent that such regulations should not be governed by the preemption provisions of the FRSA. Defendants overlook the fact that the preemption provisions of the FRSA apply to rail safety measures adopted by the Secretary, not the FRA. By transferring hazardous materials regulation from the FRA to the Secretary, Congress did not in any way separate railroad safety regulation from hazardous materials regulation, rather, the Secretary is responsible for both. Indeed, as noted, the FRSA preemption provision is tied to railroad safety regulations adopted by the Secretary, not by the FRA. Defendants' argument would make sense only if FRSA preemption was in fact tied to regulations adopted by the FRA and plainly it is not.

Every court which has specifically addressed the question has held that the preemption standards of the FRSA apply to regulations adopted by the Secretary under the HMTA. *See Atchison, Topeka & Santa Fe Railway Company v. Illinois Commerce Commission*, 453 F.Supp. 920 (N.D.Ill.1977); *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 671 F.Supp. 466 (W.D.Tex.1987), *aff'd*, 850 F.2d 264 (5th Cir.1988) (affirmed solely on FRSA preemption; Fifth Circuit found it unnecessary to rule on HMTA preemption issue); *CSX Transportation, Inc., v. City of Tullahoma*, Case No. CIV4-87-47, Slip Op. at 11, -- F.Supp. -- (E.D.Tenn.Feb. 17, 1988). In *Atchison*, at 924, the court said:

> However, these statutes do not require the overly technical interpretation which would subject orders and regulations issued by the Secretary under one law to a different preemption standard than those under another. [FRSA and HMTA] The Railroad Safety Act of 1970 provides that state action is preempted when the Secretary has issued orders or regulations covering the field. This is not limited merely to those promulgated under that Act, but refers instead to any action taken by the Secretary . . . .
>
> Any more narrow interpretation of the Railroad Safety Act would frustrate its stated purpose of establishing uniform national standards.

Similarly in *Missouri Pacific*, the court said:

> Section 434 refers to acts by "the Secretary," referring to

> the Secretary of Transportation, and does not confine itself to acts pursuant to the FRSA. Thus, an act by the Secretary pursuant to, for example, the HMTA could preempt state law under the terms of section 434.

671 F.Supp. at 471 n. 1.

> And finally, in *CSX Transportation*, at 11, the court held:
> 1. Transportation of hazardous material is regulated by the Secretary of Transportation under both the HMTA and the FRSA. Although the preemption standard is somewhat different under the two acts, under the FRSA, state action is preempted when the Secretary has issued orders or regulations covering the field. Preemption is not limited to those regulations promulgated under the FRSA, but refer instead to any other rule, regulation, order, or standard covering the subject matter and adopted by the Secretary.

The legislative history of Congressional actions taken since the enactment of the HMTA reinforce the conclusion that Congress intended the preemption provisions of FRSA to apply to regulations adopted under the HMTA insofar as they apply to rail transport. During a joint hearing before the House of Representatives in 1979, the House Committee submitted written questions to the Department of Transportation about state involvement in the regulation of transportation of hazardous materials. The answers were given by the director of RSPA and included a discussion of the differing preemption standards of the FRSA and the HMTA:

> The preemption provisions of the Hazardous Materials Transportation Act operate to preempt any State or local requirement that is "inconsistent" with the Federal regulations. Unless it is "inconsistent," a State or local requirement is *not* preempted. *In the case of a State or local restriction directed at rail transport, there is a second Federal statutory provision that acts to further limit the legal authority of States and localities. Under the Railroad Safety Act*, a State or locality is expressly preempted from any "additional or more stringent" rail safety requirement unless it is "necessary to eliminate or reduce a local safety hazard."

Hazardous Materials Transportation Act Amendments: Joint Hearing

Before the Subcommittee on Surface Transportation and Subcommittee on Aviation of the Committee on Public Works and Transportation on H.R. 3502, 96th Cong., 1st Sess. 33 (1979) (emphasis added in part).

This statement was made in the context of hearings with respect to appropriations for enforcement of the HMTA and in response to specific questions by the Congressional Subcommittee relating to the role of the states in the regulation of the transportation of hazardous materials. Viewed in this context, it is a clear statement to Congress that the Department of Transportation interprets the preemption provisions of the FRSA to apply to hazardous materials regulations adopted under the HMTA. Although amendments have been made to both the FRSA and the HMTA since that time, none of them have changed the preemption provisions of either statute.

Likewise, Congress has taken no action to overturn the decision of the District Court for the Northern District of Illinois in *Atchison, Topeka & Santa Fe Railway Company v. Illinois Commerce Commission*, 453 F.Supp. 920 (N.D.Ill.1977) The United States was an intervening plaintiff in *Atchison* and there was no appeal from the district court's decision. As noted above, the *Atchison* court held that the preemption provisions of FRSA apply to regulations adopted under the HMTA. "Congress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning." *Florida National Guard v. Federal Labor Relations Authority*, 699 F.2d 1082, 1087 (11th Cir.), *cert. denied*, 464 U.S. 1007, 104 S.Ct. 524, 78 L.Ed.2d 708 (1983), *citing Lorillard v. Pons*, 434 U.S. 575, 580-81, 98 S.Ct. 866, 869-70, 55 L.Ed.2d 40 (1978), and *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8, 95 S.Ct. 2362, 2370 n. 8, 45 L.Ed.2d 280 (1975).

Congress's failure to amend the FRSA or the HMTA preemption provisions in response to either the *Atchison* decision or RSPA's position in its response to the House Committee in May of 1979 can be read as acceptance of those interpretations. Indeed Congress's Office of Technology Assessment has accepted this interpretation in a report entitled *Transportation of Hazardous Materials*, OTA-SET-304 (Washington, D.C.; U.S. Government Printing Office, July 1986). In the context of a discussion of a federally financed program for training state inspectors, this comment appears at page 213 of the report:

> Even where State inspectors have been trained in rail safety procedures, they cannot conduct hazardous materials inspections, because authority to do so has not been granted to States.

The author of the report attributed this interpretation to the FRA. *See* Defendants' Motion for Leave to File Supplement to Prior Affidavit or to File Supplemental Pleading, Docket 26.

Defendants further argue that Congress's treatment of the role of the states in surveillance and inspection under the FRSA demonstrates its intent that regulation of the transportation of hazardous materials by rail should be governed by the preemption standards of the HMTA.

When the HMTA was enacted in 1974, Congress also amended the FRSA. The legislative history indicates Congressional displeasure with the performance of the FRA.

> The Committee found that after three and one half years, the FRA inspection of rail equipment and plant seems to be a stepchild of the Department's low key safety approach. by April 1974, the FRA had only 12 track inspectors for over 300,000 miles of rail track, 16 signal and train control inspectors, and only 50 inspectors for more than 1.7 million freight cars and 25,000 locomotives. There were only 8 inspectors for hazardous materials. When questioned about bridges and tunnels, the FRA witness revealed his department had only one bridge and tunnel expert in Washington, and yet he stated that there were 192,000 bridges. Many of these bridges are old, and one, which crosses the Mississippi River, was first opened in 1856 and is still in operation today.

H.R.Rep. No. 1083, 93rd Cong., 2nd Sess., *reprinted in* 1974 U.S.Code Cong. & Admin.News 7669, 7672.

Congress also criticized the FRA's delay in implementing provisions designed to involve the state in the enforcement of safety regulations within the scope of FRSA, as authorized by 45 U.S.C. § 435. *Id.* at 7673. Congress responded to these concerns by increasing the appropriations to administer the FRSA and requiring that a greater percentage of such appropriations be directed to enforcement activities. Transportation Safety Act of 1974, 1974

U.S.Code Cong. & Admin.News 7669 *et seq.* (codified as amended at 45 U.S.C. § 444).

In 1980 Congress again amended the state participation program under FRSA. Federal Railroad Safety Authorization Act of 1980, Pub.L. No. 96-423, 1980 U.S.Code Cong. & Admin.News (94 Stat.) 1811 (amending 45 U.S.C. §§ 431-443). This amendment expanded the scope of state participation under the inspection and surveillance provisions of FRSA, 45 U.S.C. § 435, but specifically excluded the HMTA from this program. Defendants argue that this indicates Congress's intention that the regulation of the transportation of hazardous materials by rail should be subject to the preemption provisions of the HMTA, otherwise the exclusion of the HMTA from the state certified inspection and surveillance provisions of FRSA would exclude the states from any role whatsoever in the enforcement of regulations regarding the transportation of hazardous materials by rail. Defendants argue that it would not be logical for Congress to have excluded the states from any role in this important area when it included them in the enforcement of other areas of railroad safety.

The Court agrees that it may have been logical or even desirable for Congress to have provided a meaningful state role in regulating the transportation of hazardous materials by rail. However, the issue before the Court is not the wisdom of the Congressional enactments, but what Congress intended. Based upon a considered analysis of the statutory language and the legislative history, the Court is satisfied that Congress intended that the strict preemption provisions of the FRSA apply to hazardous materials regulations applicable to railroads adopted under the HMTA. This means that the only role of the states in the regulation of the transportation of hazardous materials by rail is that narrow role permitted by the preemption provisions of the FRSA.

Defendants cite a decision of the District Court of Nevada in the case of *Southern Pacific Transportation Co. v. Public Service Commission of Nevada*, No. CV-N-86-444-BRT Slip Op. (D.Nev. Sept. 28, 1988) (attached as Appendix G to Defendants' Cross Motion For Partial Summary Judgment, Docket 16) and Inconsistency Ruling IR-19, 52 Fed.Reg. 24404, 24410, 24411 (1987), *aff'd* 53 Fed.Reg. 11600 (1988) (attached as Appendix F, Defendants' Cross Motion For Partial Summary Judgment, Docket 16).

In its brief opinion in *Southern Pacific Transportation*, the

District Court for the District of Nevada upheld regulations of the Public Service Commission of Nevada which governed the temporary storage of hazardous materials on railroad property. The Court found that the federal regulations did not address the manner of storage of hazardous materials and that there was no inconsistency between the Nevada regulations and the federal regulations. The court considered only the preemption provisions of the HMTA. No mention was made of the preemption provisions of the FRSA, thus it appears that the central issue in the present case was neither presented to, nor decided by the Nevada District Court.

Nor did the RSPA inconsistency ruling cited by defendants address the issue presented by the present case. By law RSPA is limited to a consideration of inconsistency under the preemption standards of HMTA. RSPA inconsistency rulings contain an explicit acknowledgment of this limitation upon its decision making:

> Since these precedings are conducted pursuant to the HMTA, *only* the question of statutory preemption *under the HMTA will be considered. A Federal court might find a non-Federal requirement statutorily preempted under another statute.*

See, e.g., Inconsistency Ruling IR-19, 52 Fed.Reg. 24404, 24405 (1987), *aff'd*, 53 Fed.Reg. 11600 (1988) (emphasis added). *See also* 49 C.F.R. § 107.209. The statement in this RSPA ruling that "RSPA encourages states to adopt and enforce the HMR as state requirements" does not relate to railroads. Rather, it is based on another RSPA ruling dealing with highway vehicles, an area in which RSPA has indeed encouraged an active state role. *See* IR-17, 51 Red.Reg. at 20931.

Finally, although defendants assert that at least 12 other states have adopted the federal HMR as state requirements applied to railroads, there is no evidence that such statutes are being enforced, that their constitutionality has been tested or that Congress or the Department of Transportation has in any way sanctioned their existence.

Ohio has attempted to do precisely that which Congress sought to prohibit. Ohio Rev.Code §§ 4907.64 and 4905.83 grant to the PUCO the authority to establish both a statewide system of railroad safety standards that duplicate the regulations adopted by the Secretary of Transportation under the HMTA and a procedure

for enforcement of those standards by the PUCO, including the imposition of forfeitures of up to $10,000.00 for each day of each violation. The Ohio statutes and administrative regulations fall squarely within the preemption provisions of the FRSA because the Secretary of Transportation has adopted rules and regulations covering the same subject matter.

Plaintiffs' Motion For Partial Summary Judgment is well taken. Ohio Rev.Code §§ 4905.83 and 4907.64 and Ohio Admin.Code §§ 4901:2-7-1 through 4901:2-7-22 and 4901:3-1-10 are preempted by the Federal Railroad Safety Act of 1970 and plaintiffs are entitled to an order enjoining defendants from enforcing such provisions.

By this opinion and order the Court has resolved plaintiffs' claims that the Ohio statutes and administrative regulations at issue are preempted by the FRSA. However, the Court has not addressed plaintiffs' claims that the statutes and administrative regulations are preempted by the HMTA or that they violate the Commerce Clause because they impose an undue burden on interstate commerce. Nevertheless, the Court determines pursuant to Fed.R.Civ.P. 54(b) that there is no just reason for delay in entering final judgment for the plaintiffs granting the relief demanded in the complaint. In making this determination the Court has considered the following factors: The Court's findings on the issue of preemption under the FRSA is completely dispositive of this action; a determination of the remaining claims, particularly the claim that the Ohio statutes and rules impose an undue burden on interstate commerce, will require an evidentiary hearing and an extensive and complicated analysis of the facts and law which will be unnecessary if the case can be decided solely on the preemption issue; the claim of FRSA preemption is entirely separate and distinct from the remaining claims and there is no possibility that the reviewing court could be required to consider the same issue a second time; the interests of judicial economy will be served by an immediate appeal and the parties may be spared the expense of litigating moot issues; finally, both sides in this controversy, as well as the citizens of Ohio, have a legitimate interest in a prompt determination of the important issues presented by this case which may well be facilitated by an immediate appeal.

Plaintiffs' Motion For Partial Summary Judgment is granted. Defendants' Cross Motion For Partial Summary judgment is denied. The Clerk shall enter final judgment in favor of the plaintiffs,

permanently enjoining the defendants from enforcing Ohio Rev.Code §§ 4905.83 and 4907.64 and Ohio Admin.Code §§ 4901-2-7-1 through 4901:2-7-22 and 4901:3-1-10.

It is so ORDERED.

CSX TRANSPORTATION, INC., Consolidated Rail Corporation, Norfolk and Western Railway Company, and Grand Trunk Western Railroad Company, Plaintiffs-Appellees,

v.

The PUBLIC UTILITIES COMMISSION OF OHIO, and Thomas V. Chema, Ashley C. Brown, Gloria Gaylord, Alan R. Schriber, and Lenworth Smith, Jr., in their respective capacities as Chairman and Commissioners of the Public Utilities Commission of Ohio, Defendants-Appellants.

No. 88-4185.

United States Court of Appeals,
Sixth Circuit.

Argued Aug. 17, 1989.
Decided April 13, 1990.

Before GUY, BOGGS, and NORRIS, Circuit Judges.

BOGGS, Circuit Judge.

Plaintiff railroads sought and received summary judgment for declaratory and injunctive relief against defendants Public Utilities Commission of Ohio, its Chairman, and its Commissioners, against state regulation of hazardous materials transportation, claiming that such regulation was preempted by the Federal Railroad Safety Act, 45 U.S.C. § 421 *et seq.* 701 F.Supp. 608. The defendants appealed, and we now affirm.

I.

The Hazardous Materials Transportation Act (49 U.S.C.App. § 1801 *et seq.*) (HMTA) governs the intermodal regulation of hazardous material transportation; the Secretary of Transportation (Secretary) has authority to promulgate rules and regulations under it. Under the HMTA, states can implement regulations governing the transportation of hazardous material if such regulations are

consistent with federal provisions promulgated under the HMTA. 49 U.S.C.App. § 1811(b).

Pursuant to the HMTA, Ohio enacted the Ohio Hazardous Materials Transportation Act (OHMTA) on September 26, 1988. *See* Am.Sub.H.B. No. 428, 1988 Ohio Legislative Service at 5-820 (Baldwin). The OHMTA authorized the Public Utilities Commission of Ohio (PUCO) to adopt and enforce as state requirements the federal rules regulating the intermodal transportation of hazardous materials; the statute provided in relevant part that "[t]he rules adopted under this section shall be consistent with, and equivalent in scope, coverage, and content to, the provisions of the 'Hazardous Materials Transportation Act'. . . ." Ohio Rev.Code Ann. § 4907.64.

On September 27, 1988, CSX Transportation Incorporated, Consolidated Rail Corporation, Norfolk & Western Railroad Company, and Grand Trunk Western Railroad Company (collectively, the Railroads) filed suit in the United States District Court for the Southern District of Ohio, Eastern Division, against the PUCO and its commissioners, Thomas V. Chema, Ashley C. Brown, Gloria Gaylord, Alan R. Schriber, and Lenworth Smith, Jr. (collectively, the PUCO). The Railroads operate in and through the state of Ohio, and thus would be subject to the proposed regulations.

The Railroads sought declaratory relief and temporary and permanent injunctive relief against the enactment of the OHMTA and its implementing administrative regulations on the ground that they are preempted by the Federal Railroad Safety Act (FRSA) and a burden of interstate commerce in violation of article I of the United States Constitution. The FRSA, 45 U.S.C. § 421 *et seq.*, regulates general railroad safety. The FRSA does not permit states to promulgate laws relating to railroad safety over subject matter on which the Secretary has already promulgated a rule. 45 U.S.C. § 434.

The PUCO informed the Railroads that the regulations enacted pursuant to the OHMTA would not become enforceable against railroads until December 10, 1988. In response to this information, the Railroads withdrew their request for a preliminary injunction and filed for partial summary judgment on the preemption issue on October 26, 1988. The Railroads sought to enjoin the PUCO permanently from enforcing the regulations; they

also sought a declaration that the statutes and regulations were subject to the FRSA preemption provision. The Railroads claimed that the FRSA expressed the intent of Congress to preempt state rules such as the challenged provisions of Ohio law.

On November 10, 1988, the PUCO filed a cross motion for partial summary judgment on the preemption issue raised by the Railroads. It contended that the FRSA preemption provision applies only to matters of general railroad safety, and not to the regulation of intermodal hazardous materials transportation, even when applied to railroads. The PUCO contended that the HMTA created a dual system of federal and state regulation, under which states could govern transportation of hazardous materials, by rail or otherwise, through laws consistent with their federal counterparts. 49 U.S.C.App. § 1811. The Ohio laws, it asserted, were within this sphere of state authority. It requested an order from the District Court finding Ohio Revised Code sections 4905.83 and 4907.64 valid and enforceable.

The court held a hearing on November 30, 1988, and concluded that the Ohio statutes in question constituted laws relating to "railroad safety" within the definition of the FRSA preemption provision. 45 U.S.C. § 434. On December 12, 1988, the district court granted the Railroads' motion for partial summary judgment and granted a premanent injunction. In particular, the court held that the FRSA preempted sections 4905.83 and 4907.64 of the Ohio Revised Code, and sections 4901:2-7-01 through 4901:2-7-22 and 4901:3-1-10 of the Ohio Administrative Code. The PUCO now appeals from this grant of summary judgment.

II.

In 1966, Congress created the Department of Transportation (DOT). *See* 49 U.S.C. §§ 1651-1660, as amended. The DOT received the authority under several laws previously vested in a number of government agencies and departments to regulate, among other things, the transportation of hazardous materials. P.L. 89-670, 49 U.S.C. 1651 (1966). The authority to regulate under one of these laws, the Explosives and Other Dangerous Articles Act, was transferred from the Interstate Commerce Commission. 49 U.S.C. § 1655(e)(4).

This authority to regulate, among other things, the transportation of hazardous materials transferred to the Secretary was delegated by statute to modal administrations (in this case, the Federal Railroad Administration and the Federal Highway Administration). The Federal Railroad Administration (FRA) had authority to promulgate hazardous material transportation regulations for railroads through its administration of the Explosives Act. 49 U.S.C. § 1655(f)(3)(A) (1966), *amended by* 49 U.S.C. § 1655(f)(3)(A) (1974). The Federal Highway Administration (FHA) had similar authority for motor carriers. 49 U.S.C. § 1655(f)(3)(B) (1966), *amended by* 49 U.S.C. § 1655(f)(3)(B) (1974). In both cases, the Secretary had no power either to retain the authority or transfer it to a modal administration other than the FRA (for railroads) or FHA (for motor carriers). 49 U.S.C. § 1655(f)(3) (1966), *amended by* 49 U.S.C. § 1655(f)(3) (1974).

In 1970, Congress passed an omnibus bill which enacted, among other provisions, the Hazardous Materials Transportation Control Act of 1970 (HMTCA) and the FRSA. Pub.L. 91-458, 84 Stat. 971. The HMTCA was Congress's first attempt at establishing intermodal regulation of hazardous materials. The HMTCA directed the Secretary to establish facilities within the federal government; evaluate hazards surrounding the shipment of hazardous materials; establish a central reporting system for those hazards; and review all aspects of hazardous material transportation to increase the control and safety of such transportation. 49 U.S.C. § 1761 (repealed 1974).

The FRSA was enacted to govern railroad safety. The declaration of purpose of the FRSA states:

> The Congress declares that the purpose of [the FRSA] is to promote safety in all areas of railroad operations . . . and to reduce deaths and injuries to persons and to reduce damages to property caused by accidents involving any carrier of hazardous materials.

45 U.S.C. § 421. The FRSA allows states to retain some enforcement powers in the area of railroad safety. In relevant part, the preemption provision reads:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as *the Secretary* has adopted a

rule, regulation, order, or standard covering the subject matter of such State requirement.

45 U.S.C. § 434 (emphasis added). Thus, any state regulation over an area covered by the FRSA (whether consistent or not) is preempted. This preemption provision was debated vigorously in Congress prior to passage. The House Report accompanying the FRSA stated that some of the covered "railroad safety" laws ". . . are set forth in detail in appendix B of this report." H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4104, 4105. Appendix B lists, among other laws, the Explosives Act.

With the passage of another omnibus bill in 1974, true intermodal regulation of the transportation of hazardous materials came into being. Pub.L. No. 93-633, 88 Stat. 2156. This bill enacted the HMTA and amended the DOT enabling act. It also created an independent safety board to oversee the functions and performance of each of the modal administrations within the Department of Transportation. 49 U.S.C.App. §§ 1901-1902.

The HMTA amended the DOT enabling act to prohibit the Secretary from delegating the functions, powers, and duties to administer the Explosives Act to the FRA or the FHA. Pub.L. 93-633, § 113(e)(1), (2). The amended provision read in relevant part for the FRA:

> The Federal Railroad Administrator shall carry out the functions, powers, and duties of the Secretary pertaining to railroad safety as set forth in the statutes transferred to the Secretary by subsection (e) of this section (other than [the Explosives and Other Dangerous Articles Act]).

49 U.S.C. § 1655(f)(3)(A). Thus, the regulation of the transportation of hazardous materials moved from a modal to an intermodal basis.

The preemption provision of the HMTA differs from that of the FRSA. The HMTA provides that:

> . . . any requirement of a State or political subdivision thereof, which is inconsistent with any requirement set forth in [the HMTA], or in a regulation issued under [the HMTA], is preempted.

49 U.S.C. § 1811(a). Thus, unlike the preemption provision of the

FRSA, which forbids state regulation on subject matter on which the Secretary has already adopted a regulation, the HMTA allows state regulations which are consistent with federal regulations.

In 1980, Congress amended the FRSA. Pub.L. No. 96-423, 94 Stat. 1811 (amending 45 U.S.C. §§ 431-433). Congress amended Section 425 of the FRSA to allow greater (but still limited) state participation in investigative and surveillance activities relating to railroad safety. 45 U.S.C. § 435(g). The HMTA was not listed as one of these laws. In regard to this omission, the House Report stated that, "[s]ince the [HMTA] is not directed specifically and solely at railroad safety, that Act is not within the scope of the amendment." H.R. Rep. No. 1025, 96th Cong., 2d Sess. 13, *reprinted in* 1980 U.S. CODE CONG. & ADMIN.NEWS 3830, 3837-38.

III.

The question before us is simply this: should a train carrying a load of hazardous waste be considered a railroad which happens to be carrying hazardous waste (thus suggesting application of the FRSA preemption provision) or hazardous waste which happens to be carried by rail (thus suggesting application of the HMTA preemption provision)? The Committee report to the 1974 Act states:

> The intent of the Committee in these provisions [the HMTA] is to consolidate in the Department of Transportation the [sic] certain basic functions with respect to regulated hazardous materials, while the enforcement of the regulations pertaining to the shippers and carriers of hazardous materials remains delegated to the particular Administration within DOT having jurisdiction over the mode by which such materials move.

H.R.Rep. No. 1083, 93d Cong., 2d Sess., 1974 U.S. CODE CONG. & ADMIN.NEWS 7669, 7681. We find it clear from this language, and the legislative history behind it, that the purpose of the HMTA was to consolidate regulation of hazardous material transportation at the Secretarial level, and not to remove such regulation of hazardous material transportation by rail from the preemption provision of the FRSA.

Although we credit the PUCO's compelling argument that the creation of the HMTA in 1974 removed promulgation (though not enforcement) of regulations under the Explosives Act from the FRA, we do not believe that such removal changes the fact that FRSA preemption relates to *all* rules and regulations regarding railroad safety *promulgated by the Secretary*, whether or not such regulations are promulgated by the FRA through power delegated by the Secretary. *See* 45 U.S.C. § 434. Clearly, the HMTA is a law relating to railroad safety, even if regulations pursuant to it are promulgated by the Secretary directly, not by the FRA.

We further find the PUCO's argument concerning removal of regulatory authority from the FRA by the HMTA unpersuasive in light of the plain and much-discussed preemption provision of the FRSA. *See, generally, Hearings Before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. (1970). Repeal or amendment of this preemption provision as it related to the transportation of hazardous materials was not discussed during the passage of the HMTA. In giving the Secretary authority to promulgate regulations involving the intermodal transportation of hazardous materials under HMTA, we do not believe that Congress concurrently repealed the broad historic federal preemption of state railroad regulation. *See National Association of Regulatory Commissioners v. Coleman*, 542 F.2d 11 (3rd Cir.1976).

We find that the language of the FRSA, "any law . . . relating to railroad safety," 45 U.S.C. § 434, applies to the HMTA as it relates to the transportation of hazardous material by rail. The plain meaning of a statute must be given great weight. *Watt v. Alaska*, 451 U.S. 259, 265-66, 101 S.Ct. 1673, 1677-78, 68 L.Ed.2d 80 (1981). We further note that Congress examined the problems of hazardous material transportation by rail within the context of a more general discussion of railroad safety. H.R.Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN.NEWS 4104, 4107.

To find that a later statute has repealed an earlier one, we have required that "the later law designates the statute repealed in such manner as to leave no doubt as to what statute is intended." *Equitable Life Assur. Soc. of U.S. v. Grosvenor*, 426 F.Supp. 67, 71 (W.D.Tenn.1976), *aff'd*, 582 F.2d 1279 (6th Cir.1978). The HMTA does not fulfill this test. Repeal by implication is disfavored.

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013, 104 S.Ct. 2862, 2878, 81 L.Ed.2d 815 (1984).

The PUCO contends that courts reviewing questions of federal supremacy must "start with the assumption that the historic police power of the states is not to be superseded by federal enactments 'unless that was the clear manifest purpose of Congress,' " citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). We hold that the FRSA revealed such a purpose and that the enactment of the HMTA did not demonstrate otherwise. In fact, *Santa Fe Elevator* also instructs us that one test of preemption is whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Id.* at 236, 67 S.Ct. at 1155. In this case, it is clear that matters of railroad safety are governed by the preemption provision of the FRSA.

Further, the PUCO argues that preemption is precluded where a state acts within its sphere of authority under a dual system of federal and state regulation established by Congress. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 370-78, 106 S.Ct. 1890, 1899-1903, 90 L.Ed.2d 369 (1986); *Pacific Gas & Electric Co. v. State Energy Resources Cons. & Dev. Comm'n*, 461 U.S. 190, 212-17, 103 S.Ct. 1713, 1726-29, 75 L.Ed.2d 752 (1983). However, we find that the system of regulation created by the FRSA and HMTA is of a different character than that at issue in *Louisiana Public Service Comm'n*. In that case, the reservations of authority to the state were explicit. *Louisiana Public Service Comm'n* 476 U.S. at 370, 106 S.Ct. at 1899. Thus, the Court found that such a clear reservation prevented federal preemption of those areas.

In this case, federal power to regulate transportation of hazardous materials is absolute; state power is limited. Thus, unlike *Louisiana Public Service* where the Court was concerned that "... a federal agency may preempt state law only when and if acting within the scope of its congressionally delegated authority," 476 U.S. at 374, 106 S.Ct. at 1901, we have no qualms about the scope of the DOT's authority to promulgate hazardous material transportation regulations. The only question is whether the PUCO also may do so for railroads.

In *Pacific Gas & Electric*, the state had express power to regulate the economics of nuclear production. 461 U.S. at 205-06, 103 S.Ct. at 1722-23. The federal law, the Atomic Energy Act, did

not explicitly prohibit states from exercising economic regulation. The question before the *Pacific Gas & Electric* Court was whether federal regulatory authority over nuclear production preempted a state regulation which arguably came within the express state authority. Again, the question before us is different. The federal government clearly has the power to regulate all aspects of railroad safety; state power is limited. Thus, the HMTA does not present the same type of dual regulatory authority presented in *Louisiana Public Service* or *Pacific Gas & Electric.*

We agree with the PUCO that our preemption analysis "is also to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " *Merrill Lynch v. Ware,* 414 U.S. 117, 127, 94 S.Ct. 383, 390, 38 L.Ed.2d 348 (1973), *quoting Silver v. New York Stock Exchange,* 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389 (1963) (citation omitted). However, we do not agree with the PUCO's interpretation of this language in this case. A failure to follow the preemption provision of the HMTA in no respect ousts the HMTA. In this case, the decision of the district court, applying the FRSA preemption provision to regulations promulgated under the HMTA, retains the essential character and purpose of both statutes. The national character of railroad regulation and the need for regulation of hazardous material transportation on an intermodal basis are both respected.[1] The decision of the district court is AFFIRMED.

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[1] Finding that the regulations issued pursuant to the OHMTA are preempted by the preemption provision found in the FRSA, we find it unnecessary to address the questions of whether the Ohio regulations are also preempted by the preemption provision found in the HMTA.